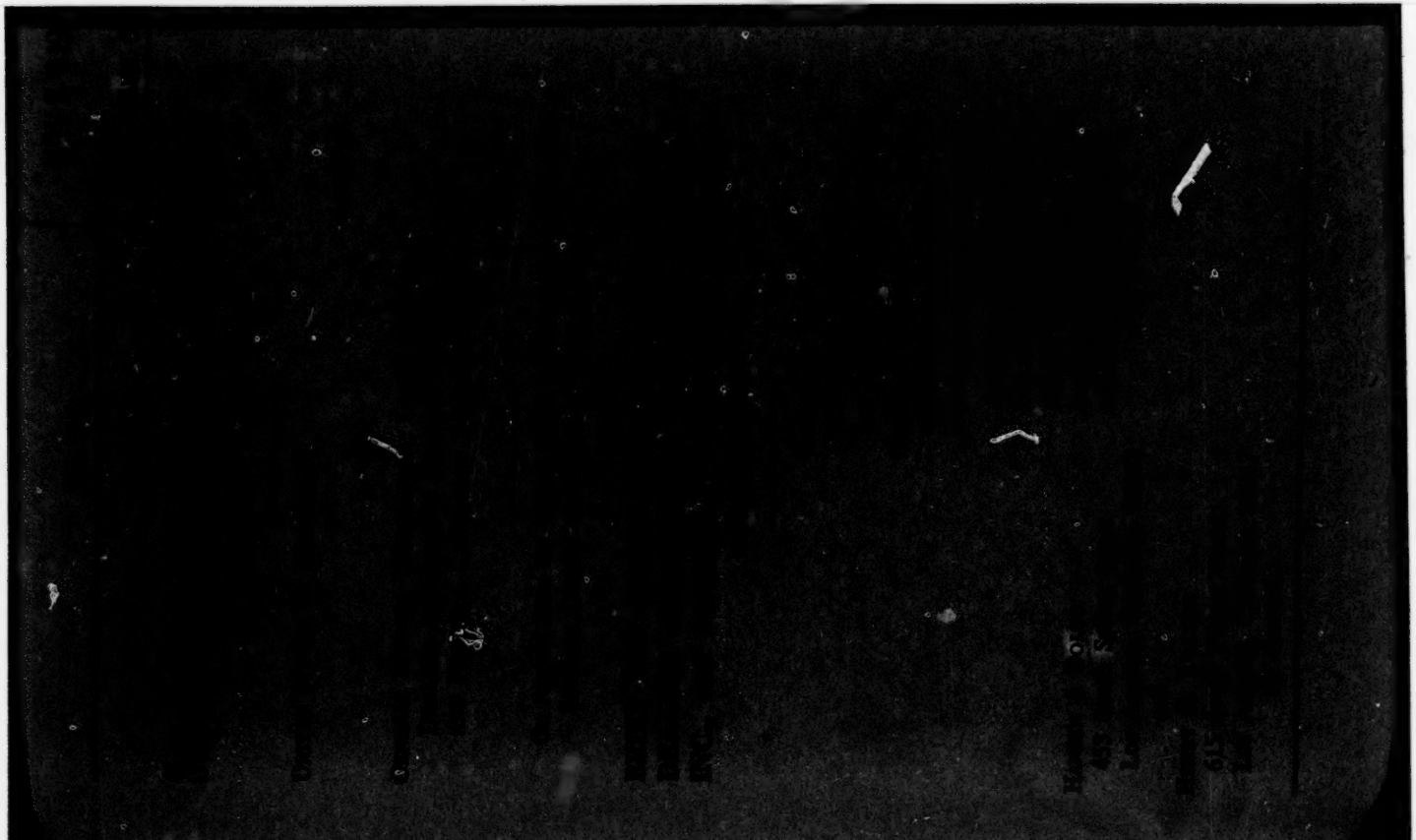

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 46

UNITED STATES OF AMERICA,

Appellant,

vs.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES, LOSOR CHEVROLET DEALERS ASSOCIATION, DEALERS' SERVICE, INC., and FOOTHILL CHEVROLET DEALERS ASSOCIATION

INTRODUCTION

This brief is on behalf of the appellees Losor Chevrolet Dealers Association, Dealers' Service, Inc., and Foothill Dealers Association (hereinafter respectively, "Losor", "DSI" and "Foothill" or the "dealer associations").

Said appellees adopt the brief of appellee, General Motors Corporation, supplemented, however, by this brief.

The dealer associations accept the sections of appellant's brief concerning "Opinion Below," "Jurisdiction,"

and "Statute Involved," but disagree with appellant's statement concerning "Questions Presented." As will be shown subsequently, no question concerning the dealer associations was presented to this Court in either appellant's Notice of Appeal or its Jurisdictional Statement. Accordingly, under this Court's rules, no question concerning these appellees is before this Court. As will also be shown, even if appellant had presented this Court with a question concerning these appellees, the record and the law both would require affirmance of the District Court's decision that these appellees had not violated the Sherman Act.

STATEMENT

Each of the dealer associations is a non-profit California corporation. Membership in Losor consists of Chevrolet dealers in Los Angeles and Orange Counties, California; in DSI, of Chevrolet dealers in Los Angeles County, California; and in Foothill, of Chevrolet dealers in Los Angeles, Riverside and San Bernardino counties, California. (Fdgs. 4, 5 and 6, R. 1376.)

The dealer associations are independent of General Motors and are not operated, directed, controlled, or guided by General Motors. Each was formed many years ago without solicitation or encouragement by General Motors. None engages in the sale of automobiles. Each provides various services for its dealer members, among which are the maintaining of an information bureau to assist dealers in making exchanges with other dealers to obtain particular Chevrolet cars of models, colors and equipment required to fill orders from particular cus-

tomers; the providing of advertising campaigns and sales promotion activities; and the engaging in advocating the passage of legislation pertaining to motor vehicles. (Fdg. 7, R. 1376.)

No contract or agreement existed between General Motors and any of the dealer associations. (Fdg. 45 in part, R. 1396.)

Each General Motors dealer, whether of Chevrolet or other General Motors cars, is individually franchised and each dealer individually has a Dealer Selling Agreement with General Motors which is substantially identical in contractual provisions. (Fdg. 9 in part, R. 1377.) These Dealer Selling Agreements restrict the dealer from establishing branch sales offices at locations other than his approved place of business. They do not preclude the dealer from soliciting customers anywhere he may see fit or from selling to them at any price, but do preclude the dealer from using unapproved business locations from which to solicit sale of Chevrolets. (Fdg. 11, R. 1378.)

Early in the summer of 1960, some Chevrolet dealers in Southern California were selling Chevrolets pursuant to agreements or understandings with some discount houses or referral services. In every case, the sale of the car to the customer was made by the Chevrolet dealer through the discount house[1] with title passing directly from the dealer to the customer; in no case did the dealer sell to the discount house; and in no case did the discount

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[1]As in appellant's brief, "discount house" will be used here to mean both a discount house and a referral service through either of which a dealer was or is selling Chevrolets.

house make a resale. (Fdg. 18, R. 1384.) Each discount house operated from a business location removed from the authorized location of the Chevrolet dealer involved and most were merchandising locations for wares of many sorts. The practice of selling Chevrolet automobiles through discount houses engaged in by some Chevrolet dealers has the same effect as direct establishment by such dealers of branch sales offices without approval of Chevrolet (Fdg. 20, R. 1385.)

Beginning in the summer of 1960, appellee Losor,[2] through some of its dealer-members, complained to the Chevrolet Los Angeles Zone Office about the sale by some dealers through discount houses. At a meeting of Losor on November 10, 1960, the Chevrolet dealers then present agreed to write letters or send telegrams to General Motors asking that something be done regarding the situation.[3] Some such letters and telegrams were sent by members of Losor and their salesmen by reason of encouragement by Losor, and some were sent independently on the writer's own initiative. Some members sent nothing and some letters were written by salesmen without the knowledge or consent of their em-

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[2]Neither appellee DSI nor appellee Foothill were then involved, their first connection being December 15, 1960, when they and Losor met for the first time concerning the problem of dealers selling through discount houses. (Fdg. 40, R. 1393. See also footnote 4, Appellant's Brief p. 8.)

[3]There was never any agreement between the dealer associations, or any of them, and General Motors as to what action General Motors would take or whether General Motors would take any action at all with respect to the practice. (Fdg. 43, concluding sentence, R. 1395.)

ploying dealer.[4] No form of letter was proposed by Losor and each member acted independently in composing and sending such letters and telegrams. In encouraging this to be done, Losor sought to bring the facts surrounding discount house merchandising of Chevrolets to the attention of General Motors policy-making officials. (Fdg. 35, R. 1391.)

After investigating and reviewing the developments in the use of discount houses throughout the United States on or before December 14, 1960, General Motors took a stand on discount houses. It sent a letter to every General Motors dealer in the United States expressing its opposition to arrangements by dealers with discount houses in view of the dealers' obligations under their Dealer Selling Agreements. Simultaneously General Motors instructed its personnel to meet individually with every such dealer to review the letter for the purpose of attempting to induce and persuade each General Motors dealer to refrain from entering into arrangements

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[4]In its brief, appellant baldly asserts that Losor "was motivated by fear of price competition." No such finding was made and the record does not support the assertion as an established fact. The trial court found: "In some instances, some of the complaining salesmen, and in one or two instances a dealer, complained in telegrams about the 'cut rate' or 'discount price' offered on sales by dealers through discount houses. The evidence in the record, however, does not indicate that General Motors at any time was concerned regarding the prices at which Chevrolet automobiles were sold since any dealer could sell at any price he desired to any customer anywhere." (Fdg. 1, 38, R. 1393.) As expressed in the latter part of Finding 35 (R. 1391), "In encouraging dealer-members and their salesmen to cause letters and telegrams to be sent to officials of General Motors Corporation, Losor sought to bring the facts surrounding the discount house and referral service merchandising of Chevrolet automobiles to the attention of policy-making officials of General Motors in Detroit."

for the sale of new General Motors cars through discount houses in violation of the Dealer Selling Agreements. (Fdg. 36, R. 1391-1392.) In carrying out these instructions, Chevrolet personnel met with every Los Angeles area Chevrolet dealer individually and endeavored to induce and persuade each dealer to refrain from the practice of selling through discount houses.

After General Motors had decided upon its stand, but before notice of this decision had been given to any of its dealers, representatives of Losor, DSI and Foothill met on December 15, 1960, for the first time regarding the practice of sales through discount houses. A committee was formed to investigate and to report back later. Consideration was also given to advocating legislation which would regulate selling through discount houses and referral services. (Fdg. 40, R. 1393.)

Early in 1961, the three dealer associations authorized investigation to determine the extent to which Chevrolet dealers in Southern California were still selling Chevrolets through discount houses. One purpose of this investigation was to secure information about whether sales through discount houses complied with the California Motor Vehicle Code so as to submit the information to the California Legislature in support of a pending bill. Thereupon a representative of the three dealer associations appeared before and submitted to an Assembly Committee of the California Legislature a proposed amendment to a bill then before the Legislature which would, among other things, regulate the sale of automobiles through discount houses. The proposed amend-

ment was accepted and became a part of the bill adopted by the Assembly of the California Legislature. [R. 218-221, inc.]

A second purpose of the investigation was to gather facts about discount house selling to present to General Motors in line with the earlier complaints which had been made. Shoppers were used in connection with this investigation. (Fdg. 41, R. 1394-1395.) Between late February and early May 1961, the dealer associations purchased seven Chevrolets through discount houses (thus showing the practice was still continuing although not necessarily with knowledge of the particular dealer). The facts thereof were given to the Los Angeles Chevrolet Zone Manager. Zone office personnel, acting without any agreement or prearrangement, thereafter informed the particular dealer of the sale. In each instance, the dealer repurchased the car. (Fdg. 42, R. 1394.)

In attempting to persuade General Motors to take some action to bring about a termination of the practice of some dealers in selling through discount houses and in bringing to General Motors' attention the information obtained in 1961, the three dealer associations were acting in furtherance of the interests of their dealer members who were parties to Dealer Selling Agreements which, as all dealers had been informed by General Motors, obligated all Chevrolet dealers to refrain from selling through discount houses. The associations did not act in combination, conspiracy or concert of action with General Motors. There was no agreement between them and General Motors as to what or whether any action would

be taken by General Motors in the matter. (Fdg. 43, R. 1394-1395.)

There was also no agreement between the three dealer associations or any of them and any of their dealer-members that any dealer member should refrain from selling through discount houses. The dealer associations at no time imposed any sanctions or withdrew any association privileges from any member engaged in that practice. The members engaging in selling through discount houses, continued to receive all the benefits of association membership without restriction or discrimination. Some dealers, supplying the greatest volume of sales through discount houses, were elected officers and directors of the dealer associations during such period of time. (Fdg. 44, R. 1395.)

ARGUMENT

INTRODUCTION

Appellant divides its argument into two parts.

First, appellant argues that the clause of the Dealer Selling Agreement of each Chevrolet dealer with the Chevrolet Division of General Motors which obligated the dealer not to establish or have a second business location without approval of Chevrolet violates section 1 of the Sherman Act. Appellant apparently concedes that the obligation is a "vertical" restraint but contends that such a "vertical" restraint here is violative of the Sherman Act, section 1. That is a matter which is fully considered and argued in the brief of General Motors. Although the dealer associations submit that such "vertical" restraint

is not violative of the law, the question does not involve them.

Second, appellant assumes correctly that the obligation of a dealer (attacked in appellant's first point) is valid and not violative of the Sherman Act. Nevertheless appellant argues, contrary to the trial court's findings, that the record as a matter of law shows a horizontal conspiracy among all *the individual Chevrolet dealers* (joined by General Motors) to prevent sales through discount houses in violation of the Sherman Act. The question raised by this point and stated in appellant's Notice of Appeal and Jurisdictional Statement also does not involve appellee dealer associations. Moreover, assuming *arguendo* that the question does concern the dealer associations, appellant has failed to make out any violation of law.

I. APPELLANT HAS RAISED NO QUESTION WHICH RELATES TO THE DEALER ASSOCIATIONS.

Both appellant's Notice of Appeal and Jurisdictional Statement stated that the sole question presented by this appeal is —

> "Whether an arrangement *between General Motors and all its franchised Chevrolet dealers in the Southern California area* whereby the latter undertook not to sell new automobiles through discount houses or referral agencies violated Section 1 of the Sherman Act." (Emphasis added.)

No other question was stated to exist or to be presented by this appeal.[5]

The dealer associations nowhere are mentioned or concerned in the stated question. None of the dealer associations engages in the sale of any automobiles. None is a franchised dealer. And the trial court found:

"43. . . . They [appellee dealer associations] did not act in combination, conspiracy, or concert with General Motors. There was no agreement *between the defendant dealer associations, or any of them, and General Motors* as to what action General Motors would take or whether General Motors would take any action at all with respect to the practice by some Chevrolet dealers of selling through discount houses or referral services. (Emphasis added.)

"44. There was no express or implied agreement *between defendant associations or between any of them and any of their dealer members* that any of said dealer members should refrain from selling through discount houses or referral services. . . " (Emphasis added.) (Fdgs. 43 and 44, R. 1395.)

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[5]On page 19 of its brief, appellant states:

"General Motors entered into agreements with each of its Los Angeles area [franchised Chevrolet] dealers forbidding the dealers to sell through discount houses. In the court below, General Motors argues that such a prohibition is implicit in the provision of its standard franchise agreement by which every Chevrolet dealer agrees not to establish a branch location without the approval of General Motors. The basic question in this case is whether the agreement prohibiting dealers from selling through discount houses violates Section 1 of the Sherman Act because it restrains trade unreasonably. The court below held it reasonable and lawful." (Bracketed words added.)

The single question, contained in both appellant's Notice of Appeal and appellant's Jurisdictional Statement, contains nothing regarding the dealer associations and the foregoing findings are not, and cannot be, questioned by appellant.

As to a notice of appeal, Rule 10(2) of the Revised Rules of this Court expressly provides:

> "2. The notice of appeal shall be in three parts: . . . (c) It shall set forth the questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail . . . The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court. . .* " (Emphasis added.)

Regarding the jurisdictional statement, Rule 15(1)(c)(1), Revised Rules of this Court, expressly provides:

> "1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated —
>
> "(c)(1) The questions presented by the appeal, expressed in the language and circumstances of the case but without unnecessary detail. . . The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.*" (Emphasis added.)

If the Revised Rules of this Court are to be meaningful, appellant must be restricted to the question set forth in its Notice of Appeal and Jurisdictional Statement. Only the question set forth "or fairly comprised therein will be considered by the court." (Rule 10(2)(c); Rule 15(1)(c)(1).) It ought to be unnecessary to say that the Rule provisions apply to appeals by the Government as well as to those by other litigants. (*United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342, so holding as to Rule 52. Federal Rules of Civil Procedure.)

Even if it were conceded *arguendo* that appellant is entitled to raise new questions for the first time in its brief, nothing in appellant's attack (in the first section of its brief) upon the Chevrolet location clause as an unlawful vertical restraint remotely concerns the dealer associations. This attack necessarily leaves out the dealer associations because the location clause exists solely in contracts between General Motors and all Chevrolet dealers.

II. THE DEALER ASSOCIATIONS DID NOT CONSPIRE IN VIOLATION OF SECTION I OF THE SHERMAN ACT.

In this section of this brief, we assume *arguendo* that the appellant is not bound by the question it framed for this appeal, so that it may legitimately argue that the dealer associations are involved in the appeal. As just demonstrated, even this assumption plainly leaves the dealer associations out with respect to appellant's attack upon the vertical agreements between General Motors and each of its Chevrolet dealers. The dealer associations

would also seem to be beyond the scope of the second part of appellant's attack, which is aimed at a supposed horizontal conspiracy, under this assumption. The horizontal conspiracy about which appellant talks was one among dealers, not among dealer associations. The purpose of this section is to show, however, that even if appellant further changes its stance and argues that the associations were involved in the supposed horizontal conspiracy, appellant is without support in the law or the record.

Appellant states that the second part of its brief proceeds on the assumptions (1) "that the agreements with each dealer barring sales by the dealer through discount houses do not unreasonably restrain trade"; and (2) "that a conspiracy in the circumstances of this case cannot be proved merely by establishing that a number of dealers called upon General Motors to prevent sales through discount outlets — by hypothesis in this part of our brief, a practice that General Motors was entitled to forbid its dealers to engage in" or by showing "that General Motors, by enforcing a restriction imposed by the franchise agreement (as General Motors interprets it) upon that practice, facilitated parallel behavior (*i.e.*, refusing to sell through discount houses) on the part of its dealers." As to the two alternatives of its second assumption, appellant correctly observes, "Both of these approaches would represent, in our opinion, an unwarranted extension of antitrust conspiracy doctrine, because the result of applying their logic would be to deem all vertical restrictions upon distributors *per se* illegal conspiracies."

Nonetheless, appellant argues that dealers would violate Section 1 of the Sherman Act by seeking to bring to the attention of General Motors the sales through discount houses by other dealers so that General Motors could take action, if it saw fit, to persuade the errant dealers to conduct their dealerships in accordance with their obligations under the Dealer Selling Agreements.

Appellant says it does "not dispute the right of individual dealers in the Los Angeles area to urge General Motors to exercise whatever rights it might have to prevent sales through discount houses, or their right to discuss the problem with each other." (Br. 39.) Appellant says, however, that the dealers "went much further" and "agreed . . . to exert pressure upon General Motors to prevent such selling" and erroneously asserts that their motive or agreement was "directed at limiting price competition" (Br. 39, 40.)

In the first place, there was no such agreement as asserted by appellant between all franchised Chevrolet dealers. It was at a meeting of Losor on November 10, 1960, where the dealer-members then present agreed to write or telegraph General Motors concerning the discount house situation. No form was suggested. Each letter or telegram was composed individually by the particular writer. Some were by dealers and some were by salesmen. (R. 40-41.) There was no discussion "concerning what the content" would be. "That was left to each individual dealer. We left it to each individual dealer to express his own opinions." (R. 47.) As early as June 1960, certain dealer-members of Losor were of

the opinion that sales through discount houses were a violation of the Dealer Selling Agreement and were undertaking to submit proof that such selling was taking place through such unauthorized location. (R. 56.) (See also R. 190-191.) Neither DSI nor Foothill was involved. In encouraging its dealer-members to write or telegraph, "Losor sought to bring the facts surrounding the discount house and referral service merchandising of Chevrolet automobiles to the attention of policy-making officials of General Motors in Detroit." (Fdg. 35, R. 1391.)

Second, appellant's logic is extraordinarily obscure. If, as appellant necessarily concedes, the dealers would not violate the Sherman Act by individually pressuring General Motors to exercise its rights or by discussing the problem with each other, how does their taking the one further step of some of them agreeing to complain become so anti-competitive as to violate the Sherman Act? We submit that there is no authority in the record, in logic or in the authorities for such a conclusion.

Appellant's further assertion that these dealers were motivated at "limiting price competition" is incorrect. The undisputed evidence shows that each dealer, at all times, has been and remains completely unrestricted and may sell a car to whomsoever he sees fit for any price he decides upon. (R. 330-331; Fdgs. 10, R. 1378) Indeed, appellant admits that the asserted "agreement was not in form one to fix prices." (Br. 41.) And, as found by the trial court, that which was done by dealers as well as that done by appellee dealer associations was done to bring to the attention of General Motors policy-making

officials the fact that some dealers were engaging in selling through discount houses—so that General Motors could determine whether and what, if anything, it should do about the situation.

Appellant argues that the activities of the dealers constituted a "boycott" of discount houses. There is no evidence that any dealer agreed with any other dealer or dealers not to sell a new Chevrolet through any discount house. There is no evidence that any of the dealer associations had or made any agreement with any dealer (whether a member or not) that the dealer was not to sell through any discount house. No sanctions, penalties or discriminations were imposed upon any dealer who sold through any discount house. Whether any dealer would or would not sell through a discount house was a matter between General Motors and that dealer under the Dealer Selling Agreement.

Apparently, it is appellant's position that any activity by dealers or by the dealer associations, to bring to General Motors' attention sales by franchised dealers through discount houses in violation of the Dealer Selling Agreement, even though the objective be the enforcement of a lawful vertical restraint, violates section 1 of the Sherman Act. The cases appellant cites for this proposition, however, do not support it because they involved obvious horizontal arrangements:

1. *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, involved a plain *horizontal* arrangement between retailers to place wholesalers (who sold to a retailer's customer) on a blacklist which

was circulated among the retailers so that the latter thereafter would withhold patronage from the blacklisted wholesaler. That is nowhere remotely akin to what is here presented by the evidence and found by the trial court.

2. *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, involved a *horizontal* arrangement by Guild members and others to boycott retailers and manufacturers who declined to comply with the Guild's program to "accomplish its unlawful object", narrowing the outlets to which garment and textile manufacturers could sell and the sources from which retailers could buy.

3. *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, involved a *horizontal* arrangement not to sell to Klor's although the latter was as well equipped as Broadway to handle the appliances of the brands of General Electric, RCA, Admiral, Zenith, Emerson and the like.

4. *United States v. Socony-Vacuum Oil Company,* 310 U.S. 148, involved a *horizontal* arrangement by defendant major oil companies and certain independent refiners for a program of purchasing gasoline in excess of amounts which defendants would have purchased but for those programs, all for the purpose of price fixing.

5. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, involved a *horizontal* arrangement of distributors of Class "A" motion picture films, between themselves,

and with "first run" exhibitors, requiring "second run" exhibitors to charge not less than a certain admission price in subsequent showings of Class "A" pictures and not to show the same with any other picture (i.e. not to "double bill").

The only other case cited—*United States v. Parke, Davis & Co.*, 362 U.S. 29—involved a situation where defendant, who sold both to retailers and to wholesalers, announced a resale maintenance policy for its products. Its representatives were instructed to and did inform wholesalers that it would refuse to deal with wholesalers who sold to retailers not observing the price policy. Its representatives also informed retailers, some of whom refused to comply to the price policy. Defendant refused to sell to non-complying retailers and directed the wholesalers not to sell to non-compliers. The result was a combination to adhere to prices as established by defendant, an agreement regarding the price at which the defendant's products were to be sold.

In the present case, the location provision of the Dealer Selling Agreement is lawful. The evidence shows and the trial court found that the restriction is reasonable and operates to promote, not to defeat, competition. Obviously, there is no "price fixing" involved. Each Chevrolet dealer is expected to and does engage in fierce competition with other Chevrolet dealers and with dealers of other makes of automobiles. Each Chevrolet dealer may sell at any price and to anyone he chooses. He has no territorial exclusivity and no territorial security. The location restriction contained in the Dealer Selling Agree-

ment is reasonable and indeed essential for General Motors to compete with others (see Fdgs. 10-32, incl.; R. 1377-1390) and promotes rather than impairs competition and benefits the purchasing public. (Fdg. 33, R. 1390-1391.)[6] The "rule of reason" is fully applicable and properly was applied in this cause. (*Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1; *Chicago Board of Trade v. United States*, 246 U.S. 231; *White Motor Co. v. United States*, 372 U.S. 253.)

As so aptly stated by the trial court in rendering its oral opinion (R. 1370-1371):

> "Since General Motors was legally entitled to enforce its contracts, the mere urging of some of its dealers for assistance would not seem to change an independent action by General Motors into a combination or conspiracy.
>
> ". . . To hold that a conspiracy arises, where a person is urged by other persons to exercise his legal rights, and he does so, would preclude communication between business organizations. In this connection the Government relies upon *United States v. Parke, Davis & Co.*, 362 U.S. 29, but that case is wholly different from this case.

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[6] "33. The Chevrolet franchise system with its location restrictions and its restrictions against transferring or assigning to third parties sales and service obligations promotes rather than impairs competition in the retail sale of Chevrolet automobiles and benefits the purchasing public. It enhances Chevrolet's ability to compete with other manufacturers, promotes the competition of Chevrolet dealers with dealers selling rival makes and promotes the competition of Chevrolet dealers with each other."

"The mere fact that General Motors brought about a result that was desired by some of the Chevrolet dealers is not sufficient to raise an inference of conspiracy. The circumstances in this case must be viewed in an environment of practicality and when that is done it is impossible to conclude that a conspiracy existed. There was no reason to conspire to do what legally could be done.

"Assuming that the court is correct in holding that General Motors has the legal power to enforce its dealership contracts and to preclude the use of discount houses by its dealers, it would be a useless act for the court to restrain General Motors or the Dealer Associations from conspiring, if there were in fact a conspiracy, when the court is actually deciding that General Motors has a legal right to do what it did and that the Dealer Associations had a right to urge General Motors to do what it did. A court of equity does not do a useless act.

"The court concludes that the Government has failed to produce proof to establish the allegations of its complaint and for the relief prayed for in its prayer. Judgment will be entered accordingly."

It must be remembered that the evidence and inferences therefrom are those which support rather than tend to defeat the findings and judgment. Rule 52, Rules of Civil Procedure, preclude the setting aside of findings "unless clearly erroneous". And, as held in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342:

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

CONCLUSION

It respectfully is submitted that the decision of the court below in favor of appellees, Losor, DSI and Foothill, should be affirmed.

Respectfully submitted,

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